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MONSTER BEVERAGE CORPORATION and
11 MONSTER ENERGY COMPANY

12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14

15 MATTHEW TOWNSEND and TED
CROSS, Individually and on Behalf of
16 All Others Similarly Situated,

17 Plaintiffs,

18 v.

19 MONSTER BEVERAGE
CORPORATION and MONSTER
20 ENERGY COMPANY,

21 Defendants.
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Case No. EDCV12-02188 VAP (KKx)

**DEFENDANTS' OBJECTIONS
TO NEW EVIDENCE SUBMITTED
WITH PLAINTIFFS' REPLY IN
SUPPORT OF MOTION FOR
CLASS CERTIFICATION**

The Honorable Virginia A. Phillips

Date: January 29, 2018

Time: 2:00 p.m.

Ctrm: 8A

Trial Date: none set

Date Action Filed: December 12, 2012

Defendants Monster Beverage Corporation and Monster Energy Company hereby object to new evidence submitted by Plaintiffs with Plaintiffs' Reply Memorandum in Further Support of Motion for Class Certification (ECF No. 126). Specifically, Plaintiffs have submitted a "Supplemental Report" by Thomas J. Maronick, which is based in part on a second consumer survey he conducted in early October 2017 ("Study 2"). (ECF No. 134-2.)

Study 2 and the portions of Dr. Maronick's Supplemental Report that are based on Study 2 are not "rebuttal" evidence, and there is no justification for Plaintiffs' failure to submit this evidence with their November 13, 2017 opposition to Defendants' motion to strike Dr. Maronick. By waiting until December 5 to disclose Study 2 and Dr. Maronick's related opinions, Plaintiffs have deprived Defendants of an opportunity to meaningfully respond, and have prejudiced Defendants. Accordingly, Defendants object to and request that the Court strike Dr. Maronick's Study 2 (Maronick Supp. Rpt. Ex. B) and Paragraphs 3c, 11-14 and 61-88 of his Supplemental Report, which are based on Study 2.

I. RELEVANT BACKGROUND

On June 26, 2017, Plaintiffs' expert Dr. Maronick submitted a report in support of Plaintiffs' motion for class certification, which discussed, among other things, the results of a survey he conducted between May 15 and 22 ("Study 1"). (ECF No. 95-5; *see also* ECF No. 98.) Defendants took Dr. Maronick's deposition on September 6, and questioned him extensively regarding the methodology for Study 1 as well as the conclusions he drew based on the responses to the questions in that study.¹ Based on flaws in Study 1, on October 16, Defendants moved to strike Dr. Maronick as an expert. (*See* ECF No. 110.)

On November 13, Plaintiffs opposed Defendants' motion to strike. (ECF No.

¹ (*See* ECF No. 114, Declaration of Dan Marmalefsky ¶ 2, Ex. A; ECF No. 110, Motion to Strike the Expert Report and Testimony of Thomas Maronick at 6, 10-12, 19-20.)

124.) At that time, Plaintiffs did not file any further report from Dr. Maronick or disclose that he had conducted any further surveys. (*See id.*) Three weeks later, on December 5, Plaintiffs filed their reply in support of class certification (ECF No. 126), accompanied by a Supplemental Report from Dr. Maronick, based in part on a second survey he conducted between October 5 and 11 (Study 2). (Maronick Supp. Rpt. ¶ 67.) This was the first time Plaintiffs disclosed Study 2, which had been conducted one month *before* Plaintiffs’ opposition to Defendants’ motion to strike Dr. Maronick and nearly two months *before* Plaintiffs’ reply filings.

9 **II. DR. MARONICK’S “STUDY 2” IS UNTIMELY AND SHOULD NOT** 10 **BE CONSIDERED BY THE COURT**

11 Plaintiffs chose to wait until the due date for Defendants’ reply brief in
12 support of their motion to strike Dr. Maronick to reveal that Dr. Maronick had
13 conducted a second survey, thereby denying Defendants the opportunity to evaluate
14 Study 2 and respond to Dr. Maronick’s conclusions based on Study 2. As such, the
15 Court should decline to consider this “completely new evidence” that Plaintiffs
16 delayed filing until it was too late for Defendants to respond. *See In re ConAgra*
17 *Foods, Inc.*, 302 F.R.D. 537, 559 n.87 (C.D. Cal. 2014) (declining to consider a
18 consumer perception survey introduced for the first time on reply).

19 Indeed, Dr. Maronick admits that he “design[ed]” his second survey to
20 “address any perceived flaws in” his first survey. (Maronick Supp. Rpt. ¶ 3(c).)
21 Dr. Maronick conducted Study 2 in the time between his September 6 deposition
22 and Defendants’ October 16 motion to strike. (*Id.* ¶ 67) (stating Study 2 conducted
23 between October 5 and 11). Yet Plaintiffs waited until December 5 to introduce
24 Study 2, despite the fact that the results of Study 2 were available to Plaintiffs well
25 before they opposed Defendants’ motion to strike on November 13. No basis exists
26 for Plaintiffs’ decision to save Study 2 for their reply in support of class
27 certification. Dr. Maronick’s conclusions based on Study 2 should have been
28 submitted, if at all, with Plaintiffs’ opposition to Defendants’ motion to strike.

1 Plaintiffs' blatant "sandbagging" has prejudiced Defendants and deprived
 2 Defendants of the orderly process the Federal Rules envision. Defendants had no
 3 meaningful opportunity to evaluate Study 2, cross-examine Dr. Maronick at
 4 deposition regarding Study 2, work with their own experts, and include in their
 5 reply papers a discussion addressing defects in Dr. Maronick's Study 2.² This need
 6 to "conduct additional discovery" is in and of itself prejudicial. *Chavez v.*
 7 *AmeriGas Propane, Inc.*, No. CV 13-05813 MMM (MANx), 2015 WL 12859721,
 8 at *4 n.44 (C.D. Cal. Feb. 11, 2015) (refusing to consider new evidence offered on
 9 reply because the defendant "would be prejudiced" by having to "conduct
 10 additional discovery prior to filing its surreply").

11 Under these circumstances, the Court "can refuse to consider evidence or
 12 argument offered for the first time in reply." *Sanchez v. County of San Bernardino*,
 13 No. CV 10-09384 MMM (OPx), 2014 WL 12734756, at *4 (C.D. Cal. Mar. 10,
 14 2014); *Chavez*, 2015 WL 12859721, at *4 (declining to "consider the new evidence,
 15 arguments, and theories first raised in [the plaintiff's] reply"). Plaintiffs should not
 16 be rewarded for their tactical decision to delay disclosure of Dr. Maronick's Study 2
 17 and related conclusions. *See Clark v. State of California*, No. C 96-1486 CRB,
 18 2010 WL 11409688, at ¶ 240, n.14 (N.D. Cal. Sept. 16, 2010) (declining to consider
 19 new evidence introduced on reply because "consideration of this evidence at this
 20 stage would deprive [the opposing party] of the opportunity to cross-examine the
 21 relevant witness"); *see also Contratto v. Ethicon, Inc.*, 227 F.R.D. 304, 308 n.5
 22 (N.D. Cal. 2005) (striking declaration submitted on reply "[t]o the extent that the
 23 declaration introduces new evidence not presented in either the motion or
 24 opposition") (citing authorities).

25 _____
 26 ² Defendants requested the raw data for Dr. Maronick's Study 2 from Plaintiffs
 27 on December 13, and received it after 5 p.m. PT on December 20, which further
 28 impeded Defendants' and Defendants' expert Dr. Kent Van Lier from evaluating
 Study 2. (Declaration of Daniel J. Wilson in Support of Defendants' December 22,
 2017 Filings ¶ 14; Supplemental Expert Report of Dr. Kent Van Lier ¶ 4.)

1 **III. CONCLUSION**

2 For all these reasons, Defendants respectfully request that the Court sustain
 3 Defendants' objections to the new reply evidence identified above and strike Study
 4 2 and the portions of Dr. Maronick's Supplemental Report that are based on Study
 5 2 (*i.e.*, Paragraphs 3c, 11-14 and 61-88). If the Court is inclined to consider Study
 6 2 and related portions of Dr. Maronick's Supplemental Report, Defendants
 7 respectfully request that they be given an opportunity to re-depose Dr. Maronick
 8 and file either a sur-reply to Plaintiffs' motion for class certification or a
 9 supplemental brief in support of Defendants' motion to strike Dr. Maronick.³

10
 11 Dated: December 22, 2017

MORRISON & FOERSTER LLP

12
 13 By: /s/ Dan Marmalefsky
 14 Dan Marmalefsky

15 *Attorneys for Defendants*
 16 *Monster Beverage Corporation and*
 17 *Monster Energy Company*

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 25 ³ See *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) ("Where new
 26 evidence is presented in a reply to a motion for summary judgment, the district
 27 court should not consider the new evidence without giving the [non-] movant an
 28 opportunity to respond.") (alteration in original, citations and internal quotation
 marks omitted).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of December, 2017, the foregoing document was filed electronically on the CM/ECF system, which caused all CM/ECF participants to be served by electronic means.

/s/ Dan Marmalefsky
Dan Marmalefsky

***Attorneys for Defendants
Monster Beverage Corporation
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